Supreme Court, U.S.
FILED
AUG 6 1991
OFFICE OF THE CLERK

(3)

No. 90-1713

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA

v.

ALEJANDRO GARCIA IBARRA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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We agree with respondent (Br. in Opp. 5) that the principle that should govern this case is that it is the content, not the caption, of a pleading that determines whether it is a motion for reconsideration and therefore delays the commencement of the time during which a party must file a notice of appeal. We disagree with respondent, however, in a fundamental respect as to the proper application of that principle. A motion for reconsideration is simply a motion that asks a court to "reconsider [a] question decided in the case" in order to effect an "alteration of the rights adjudicated." *United States* v. *Dieter*, 429 U.S. 6, 9 (1976), quoting *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942). Under that standard, the motion filed in this case was clearly a motion for reconsideration,

because it asked the district court to reconsider the question decided in the case—whether particular evidence should be suppressed—in order to alter the parties' rights by permitting the government to introduce the evidence at trial.

Respondent argues that a motion that seeks reconsideration on the basis of previously conceded issues is not a motion for reconsideration, but is something else. The motion is not a motion for reconsideration, he argues, because the law does not require a district court to grant relief on the basis of factual issues that a party has conceded at some point in the litigation. The problem with that approach, however, is that it makes the question of denomination, and thus the issue of jurisdiction, turn on the merits of the motion. A district court may conclude in a case such as this one that the government may not withdraw its concession, and a court of appeals may agree with the district court. But that is a ruling on the merits of the motion; it does not change the character of a motion from one seeking reconsideration to something else and thereby deprive the court of appeals of jurisdiction over the entire appeal. See *United States* v. *Lefler*, 880 F.2d 233, 235 (9th Cir. 1989) (timely filed motion for reconsideration delays time for filing appeal even though district court lacks jurisdiction to grant relief requested in motion); *United States* v. *Carr*, 932 F.2d 67, 72 (1st Cir. 1991) (motion for reconsideration delayed time for filing appeal because it "cannot, under today's case law, be said to have been unquestionably and blatantly outside the district court's jurisdiction to resolve"), petition for cert. pending, No. 90-8125.

The mischief of the court of appeals' approach is obvious. In many cases, the government has presentable grounds for appeal, but wishes to make an additional argument on reconsideration that was either conceded or not previously raised before the district court. If the court of appeals' decision stands, the government would be virtually forced to forgo that

step, even if the additional argument were so strong that the district court would be quite likely to grant relief, because the consequences of a denial of relief by the district court would be to render the entire appeal untimely.

Moreover, in some cases it is likely to be disputed whether the government, in its motion for reconsideration, is in fact seeking to avoid the effect of a prior concession. Under the court of appeals' analysis, that question would have to be resolved before the court could determine whether the government's notice of appeal was timely. That rule would generate uncertainty, which would force the government to bypass a possible motion for reconsideration any time it appeared possible that the court of appeals might conclude that the motion for reconsideration consisted, in effect, of an effort to withdraw from a prior concession. Making jurisdictional issues turn on such questions, which by their nature cannot be resolved until the appellate court considers the case, would make the process of seeking reconsideration of adverse judgments unnecessarily cumbersome and risky. The better rule, and the one that is consistent with this Court's decision in *United States* v. *Dieter*, 429 U.S. 6 (1976), is that if the government asks the district court to change its ruling, the motion is one for reconsideration, and a notice of appeal filed within 30 days of the denial of that motion is timely.

The Court in *Dieter* recognized the importance of a bright-line jurisdictional rule, independent of the merits of a reconsideration motion. As *Dieter* teaches, the only appropriate jurisdictional inquiry is whether the purpose of the motion is to obtain reconsideration of the order entered by the district court. Here, contrary to respondent's suggestion (Br. in Opp. 8), the precise purpose of the government's motion was "to obtain reconsideration of the district court's suppression order" and neither the court of appeals nor the district court—whatever their view

of the merits of that request—suggested otherwise. Under *Dieter* that should have been enough to extend the time for filing an appeal.

Respondent repeatedly suggests that the holding in this case is limited to attempts to retract conceded "factual" issues on the basis of an inadequate record (see, *e.g.*, Br. in Opp. 5-6, 8, 9). The Tenth Circuit in *Dieter* drew a similar distinction between legal and factual issues, which this Court emphatically rejected. 429 U.S. at 8. *Dieter* held that it is the relief sought, not the merits of the request, that determines whether the post-trial motion extends the time for appeal. 429 U.S. at 8-9. Accordingly, questions of the adequacy of the record to support the motion for reconsideration implicate only the merits of the motion, not its effect on the appellate court's jurisdiction.

Respondent relies heavily on the fact that the court of appeals stated (Pet. App. 10a-11a n.7) that its holding was limited to the context before it—a motion to reconsider based on a previously conceded issue. Significantly, however, in the same footnote on which respondent relies the court went on to suggest that it would reach the same result in a case in which a new ground for relief was presented, and the analysis of the court in this case would support, if not compel, such a result.

For example, the court flatly rejected the government's contention that any motion that "request[s] reconsideration of the ultimate issue—the district court's holding on the suppression of evidence—[serves] to toll the time for filing a notice of appeal." Pet. App. 10a-11a. Instead, the court reasoned that because the government's reconsideration motion relied on an argument that earlier had been conceded, it "did not request that the district court correct an alleged error of law or set aside a ruling on the grounds of mistake or inadvertence"; the court therefore concluded that the motion did not ask the district court

to "reconsider" anything the court had decided, even though the motion asked for reconsideration of the order suppressing evidence. Pet. App. 9a-10a.

The same reasoning would apparently apply with equal force to reconsideration motions that raise new legal or factual arguments; respondent suggests no principled basis for limiting the court's reasoning to the narrow situation presented. Indeed, the court took the position that under the analogous Rule 40(a) of the Federal Rules of Appellate Procedure, the purpose of a rehearing petition is to correct "errors of fact or law on the issues already presented," and not to "permit parties to assert new grounds for relief." Pet. App. 11a n. 7. That remark strongly suggests that the court of appeals would have reached a different result than that of the court in *United States* v. *Ladson*, 774 F.2d 436 (11th Cir. 1985), where the court of appeals held that a motion for reconsideration that raised a new argument tolls the time for filing a notice of appeal.

Respondent also suggests (Br. in Opp. 7) that the decision of the court of appeals is nothing more than an application of the exception noted in *United States* v. *Healy*, 376 U.S. 75, 80 n.4 (1964), for reconsideration motions filed in bad faith or for purposes of delay. As the dissenting judge in the court of appeals expressly noted, however, "no showing of bad faith has been made in this complex, multi-issue suppression case." Pet. App. 14a. Nothing in either the district court's opinion or the opinion of the court of appeals supports respondent's suggestion. Indeed, although respondent bases his suggestion on the assertion that the government consistently failed "to provide any basis in law or fact for asking the district court to [re]consider [the previously conceded issue]" (Br. in Opp. 7), the district court observed that the government in its reconsideration motion "argues that it has found case-law that supports a 'continuing consent' theory," a clear indication that the government

was proceeding in good faith in its effort to have the suppression order overturned. Pet. App. 22a-23a (citing cases).

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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AUGUST 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/45006